Testimony of W. Ron Allen, President
National Congress of American Indians
Before the United States Senate Committee on Indian Affairs

Regarding S. 2097, the "Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998"

July 15, 1998

Good Morning, Chairman Campbell, Vice Chairman Inouye and distinguished Senators. It is an honor to be invited to provide testimony before the Senate Committee on Indian Affairs. I am W. Ron Allen, Chairman of the Jamestown S'Klallam Tribe and President of the National Congress of American Indians (NCAI). As the oldest and largest national Indian advocacy organization in the United States, NCAI is dedicated to advocating on behalf of our 250 member tribal governments on a broad range of issues affecting the health, welfare and self-determination of Indian Nations. I appreciate the opportunity to comment on S. 2097, the 'Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998."

I would like to begin my testimony by thanking Chairman Campbell for his diligent work and oversight of this year's series of hearings on tribal sovereign immunity and Senator Slade Gorton's bill, S. 1691. The record created from these hearings clearly shows that S. 1691 is an excessively destructive bill intended to broadly waive all tribal immunity and place jurisdiction over tribal matters in state and federal courts rather than tribal courts. In this same vein, I would also like to commend Chairman Campbell for his work in developing S. 2097. NCAI is very appreciative of this initiative to find constructive solutions to the concerns about tribal immunity in a manner that protects the inherent right of tribal self-determination and self-governance and does not expose tribal governments to unbounded litigation. NCAI would like to continue to work closely with the Committee in this area to assure that any new federal statutes will address these issues in a thoughtful manner that recognizes the federal trust obligation to protect tribal sovereignty.

At the outset, I must note that the member tribal governments of NCAI have not formally taken a position on S. 2097 through our resolutions process. The topics at issue in S. 2097, the sovereign immunity of tribal governments and tribal-state taxation relationships, are weighty subjects with long histories in federal Indian policy. The legislation is less than two months old, and tribal governments have not yet had the time and opportunity to come to a consensus position through close and comprehensive analysis of the bill in light of all the possible alternatives. My comments today are intended to further the discussion of the bill, and not to signify an NCAI position. This limitation, however, should fit well with the goals of the Committee to enable full consultation and deliberation on the bill with tribal governments.

S. 2097 is divided into two broad titles, the first creating an alternative dispute resolution mechanism for tribal governments and states governments on the issue of state retail sales tax collection in Indian country, and the second creating a program of insurance through the Department of Interior to assure that tribal tort liability is adequately covered. I will address each of these areas individually, but would like to begin with the suggestion to the Committee that these two titles be severed into separate pieces of legislation. We make this suggestion for two reasons.

First, we believe that the deliberations of Congress and the process of consultation with tribal governments will be greatly aided by having each of these substantial and largely unrelated topics considered on their own. In my discussions with tribal leaders, I have found that many have differing opinions about the two titles of the bill. We feel that there is too great a risk that good legislation in one area could be dragged down by less developed legislation in the other, or that in reverse, unripe legislation in one area could be buoyed up by support for the other. Second, NCAI and many tribal leaders are concerned about creating an 'omnibus' bill intended to provide resolution to the sundry concerns raised in the sovereign immunity hearings. No matter how well designed and intentioned this legislation may begin, it will likely become a target for unfriendly amendments by any interest group with a gripe against Indian tribes.

NCAI would like to once again extend its sincere thanks to the Chairman and Vice Chairman and many other members of the Committee for this hearing and their efforts to understand and convey the message of tribal self-governance. Like other forms of government, tribal governments are not perfect, but any solutions should be based on careful study of the true circumstances and guided by the principle that it is the federal government's role to protect tribal self-government. NCAI is looking forward to engaging in that process with the Committee.

Title I: Intergovernmental Agreements

Title I would create an alternative dispute resolution mechanism for tribal governments and states governments on the issue of state retail sales tax collection in Indian country. This is an issue that has received a great deal of attention recently, but has often been mischaracterized by those who refuse to recognize Indian tribes as governmental entities with the authority to set their own tax policies, and instead have chosen to cavalierly accuse tribal governments of "tax evasion' and 'unfair competition.'

While these accusations are unsupportable, it is fair to say that this area of law and federal Indian policy is often confusing and untidy. The Supreme Court has adopted a per se rule that, except where authorized by Congress, tribes and tribal members on reservations are exempt from state sales and other taxes.1 The rule regarding state taxation of transactions between Indian sellers and non-Indian buyers is more complex. In these cases, the test is dependent on the specific facts presented in the case concerning the impacts of a state tax on federal and tribal interests and on the purposes of the particular state tax.2 In sales of goods such as cigarettes and motor fuels, if the incidence of the tax falls on the non-Indian purchaser, the Supreme Court has held that the state tax is lawful, even though the sale took place on an Indian Reservation and that tribes may be required to make reasonable efforts to assist in collection of the tax. 3

Tribal governments have fundamentally disagreed with this result, because it either eliminates their much needed ability to tax the transactions themselves, or results in double taxation by both tribes and states, which ends their ability to compete. It is important to note that states are <u>not required</u> to collect such taxes, but have the option to do so. As a result, a number of states have chosen to not collect the taxes out of respect for tribal self-governance, a desire to foster economic development or to support the tax base of tribal governments, sometimes with the requirement that the tribal government collect a similar tax in order to promote price parity.

Indian tribes also object to the imposition of state taxes because it exacerbates the flight of revenue from reservations to state coffers. On most reservations, there are few retail stores and tribal members go off reservation and pay state taxes on everything they buy. On an annual basis, hundreds of millions of dollars flow off reservations and into state governments coffers, yet the states provide very little in the way of services on Indian reservations. The Supreme Courts rulings on cigarettes and motor fuels exacerbate this exodus of revenues by requiring tribes to collect the state taxes when nonmember purchase these goods on the reservation. This system provides no parity for tribal governments and adds to the many structural pressures that keep Indian reservations among the poorest communities in the country.

Most states and tribes have resolved their disputes about application of state sales and other taxes by entering into intergovernmental agreements or compacts. According to

1 California v. Cabazon Band, 480 U.S. 202, 215, n. 17 (1987).

2 White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

3 New York Tax Dep't. v. Milhelm Attea & Bros., 512 U.S.__ 129 L. Ed.2d 52 (1 Confederated Colville Tribes v. Washington, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

a report issued by the Arizona Legislative Council, 4 more than 200 tribes in 18 states have created successful state-tribal compacts that are now in force and are mutually satisfactory to both parties. Most of these agreements follow the pattern of the major Supreme Court tax cases by either exempting all on-reservation sales to Indians from state tax, but agreeing to imposition and collection of taxes on sales to non-Indians, or agreeing on the part of the tribe to impose the same tax as that imposed by the state, and sharing this "single tax" between the tribe and the state on a prearranged basis, reflecting the percentage of the sales to Indians as contrasted to non-Indians.

State taxes on Indian lands have been effectively handled through negotiated agreements at the tribal-state level for many years because the states currently have adequate legal remedies to pursue in collecting taxes on sales to non-tribal members that occur on Indian lands. The Supreme Court has detailed the remedies available to a state in the event that it cannot reach an agreement with a tribe for the collection of retail sales taxes. In *Oklahoma Tax Commission v. Citizen Band of Potawatomi,* 498 U.S. 505 (I 991), the Court identified a number of ways that a state can collect a lawfully imposed tax:

> There is no doubt that sovereign immunity bars the state from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions by the state. And under today's decision, states may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers who supplied unstamped cigarettes to tribal stores. States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax.

As pointed out in the Potawatomi decision, state governments have the option to collect taxes from wholesalers of tobacco or motor fuels, and pre-collect any taxes before the product reaches the Indian retailer. Many states, even those without tribes, are shifting to this type of tax collection because of its efficiency and effectiveness. In addition, the federal government is, now leading the states in a movement toward pre-collection of taxes at the highest levels of the distribution chain, at the "terminal rack' for motor fuels, and at the manufacturer for cigarettes. These methods of tax collection are extremely effective at stopping many forms of tax evasion, including interstate smuggling. In addition, these methods leave discretion in the hands of state governments and do not single out Indian tribes for disparate treatment. Because this movement is already well underway, it is highly likely that any remaining tribal-state tax issues will be resolved through this new tax collection framework without any intervention by Congress.

4. "STARTED: State-Tribal Approaches Regarding Taxation & Economic Development", Arizona Legislative Council, November, 1995 at 81. See generally, 81-105.

Because of the conflicting legal and policy considerations in this area, NCAI would like to respond to the alternative dispute resolution mechanism suggested in Title I of S. 2097 with great care and deliberation. Federal funding has never been adequate to fulfill the needs in Indian country, and Indian tribes generally do not have the ability to impose income and property taxes to raise revenue. As a result, many tribal governments have imposed retail sales taxes to provide governmental revenue, and a number also are engaged in tribal revenue generating ventures that retail commodities such as cigarettes and motor fuels. The revenues that accrue to tribes from these sources are absolutely critical to the provision of essential government services to some of the poorest communities in the United States.

Due to these conditions, tribal governments would be greatly concerned about the creation of a forum that would lead to greater state taxes on Indian reservations. In our review of S. 2097, we are unclear whether Section 103 is intended to create a tribunal, the Intergovernmental Dispute Resolution Panel, that can render binding decisions on tribal governments that would be enforceable in court. We are concerned that an inflexible application of federal law, overriding tribal immunity without regard to the concerns of duel taxation and tribal revenue streams, would lead states to forsake their current tax agreements with tribes. In the long run, this would result in greater state taxation of transactions on Indian lands and a continuing destabilization of tribal governments and delicate tribal economies.

Considering this background and overview of existing conditions, tribal governments are using negotiated dispute resolution on a more frequent basis as an alternative to litigation or legislation, and not only for tax issues. We believe that S. 2097 is generally headed in the right direction by exploring these concepts. Certainly, tribal governments have found themselves on the losing side of federal court decisions more frequently in recent years, and negotiated resolutions offer the possibility of achieving the desired outcomes without the risks of setting unfavorable precedents in federal case law.

In addition, NCAI has witnessed an increasing amount of negative federal legislation in Indian affairs that results from unresolved local disputes between tribal governments and local communities. The opponents of tribes then push these isolated disputes to the national stage as anecdotal evidence of a need for widespread reform of federal Indian law. Forums for negotiations and dialogue at the tribal/state/local government levels could help to resolve issues before they become national concerns and

result in a more favorable climate in Congress.

As the Committee deliberates on the issues of negotiated dispute resolution, NCAI would like to make several suggestions. First, tribal governments and states are already engaging in a wide variety of negotiation processes, and these negotiations benefit from the complete freedom of the parties to set their own style of negotiation. Prescripted rules for negotiations may be counterproductive. NCAI believes that a great deal could be achieved in this area by providing technical resources, training, models and expertise in alternative dispute resolution as well as general encouragement and validation of the process. Second, in our experience NCAI has found that it is critical that any facilitators of negotiated disputed resolution have a firm understanding of federal Indian policy. Facilitators who lack this knowledge will often discriminate against the tribal government viewpoint because they do not understand the underlying principles. Finally, NCAI believes that any dispute resolution process defined in federal law on the issue of state retail sales taxes should be non-binding and look to achieve its results through dialogue and mutual recognition of common interests.

Title II: Tort Liability Insurance

Title II of S. 2097 would require the Secretary of Interior to obtain or provide tort liability insurance or equivalent coverage for each Indian tribe that receives a tribal priority allocation from the Bureau of Indian Affairs. This issue of tribal immunity for tort liability has also arisen in the midst of a good deal of misinformation. The opponents of tribes have repeatedly stated that tribes are the only entities in the U.S. to continue to exercise the "anachronistic" doctrine of sovereign immunity. The reality, however, is that tribal governments exercise a form of immunity that is similar in scope to that of states and the federal government.

Governmental immunity from suit is an inherent right of all governments, including the federal, state and tribal governments, for reasons of sound public policy. The purpose served by this policy is to provide special protection against loss of assets held for the performance of vital government functions. Since 1946, the federal government, most states and many tribes have provided limited waivers of sovereign immunity that allow these governments to be sued when the government functions in the same manner as a private individual, such as when a government employee gets in a car accident. However, the federal government, states and tribes have retained sovereign immunity in broad areas in order to protect governmental functions from lawsuits and limit the size of damages claims.

It is well known that in 1946 Congress passed the Federal Torts Claims Act (FTCA), 5 which exposes the United States government to limited liability for certain tort claims in the same manner as a private individual. The FTCA does not waive immunity for interest prior to judgment or for punitive damages, and in addition, any claim for money damages must first be presented to the appropriate federal agency. In 1988 amendments to the FTCA, Congress clarified and strengthened the federal government's right to any defense based upon judicial or legislative immunity. Under this statute, the federal government has retained its rights to sovereign immunity in broad areas, including those functions that are inherently 'governmental.'

5 28 U.S.C. §§ 2671-2680.

What is less well known and understood is the degree to which many state governments have only recently begun to provide waivers of state immunity which are a great deal more limited that the FTCA. A common trend is for state governments to impose a ceiling on the amount of recoverable damages or to limit recovery to the extent of insurance coverage. Although the dollar amounts vary, many states have adopted a cap of $100,000 for injuries arising from a single occurrence. 6 Some states set lower caps for property damage claims. 7 In this regard, NCAI would refer the Committee to the testimony of the Shakopee Mdewakanton Sioux Community on May 6, 1998 on the issue of the extremely limited state waivers. This testimony details the numerous states which continue to assert complete or near complete sovereign immunity for their tortious conduct.

In comparison, the exercise of tribal sovereign immunity is relatively generous to claimants. Most Indian tribes in this country provide appropriate remedies to those who may be injured by tortious conduct. Like the federal and state governments, many tribes have voluntarily provided for limited waivers of their immunity 8 and/or have insurance to cover their potential liability. 9 This is a growing trend evidenced by an increasing number of civil claims handled by tribal courts 10

Tribes and tribal officials also are subject to suit under various exceptions to tribal sovereign immunity recognized by the courts. For example, courts have applied the Ex *Parte Young* doctrine to tribal officials. This doctrine creates an exception to the general rule of sovereign immunity when an official acts outside of the government's authority. Tribal sovereign immunity also has been limited by various courts where allegations of personal restraint and deprivation of personal rights were raised. 11 In addition, pursuant to federal law, Indian tribes, contractors and employees are deemed to be agents of the

6 See, e.g., Ala. Code 11-93-2 (1992); Fla. Stat. Ann. 768.28(5) (Harrison 1992); Okla. Stat. Ann. Tit. 51, 154 (West 1993).

7 See, e.g., Okla. Stat. Ann. Tit. 51, 154(A)(1) (West 1993) ($25,000); Tex. Civ. Prac. & Rem. Code Ann. 102.003 (West 1986) ($10,000).

8 See, Weeks Constr., Inc. v. Ogiala Sioux Hous. Auth., 797 F.2d 668, 671 (8th Cir. 1986) (stating that tribal ordinance bars use of sovereign immunity); Merrion v. Jicarilia Apache Tribe, 617 F.2d 537 (10th Cir. 1980) (finding express waiver of immunity in severance tax ordinance).

9 Joseph Calve, Pequots Won't Gamble on Lawsuits at New Casino, Conn. L. Trib., Mar. 2, 1992, at 1. NCAI's informal sampling indicates that a substantial proportion of tribal governments carry insurance.

10 See, The Honorable Sandra Day O'Connor, Lessons from the Third Sovereign: Indian Tribal Courts, The Tribal Court Record, Spring/Summer 1996, at 12.

11 Dry Creek Lodge v. Arapahoe and Shoshone Tribes, 515 F.2d 926 (10th Cir. 1975).

federal government for the purposes of the FTCA when a tribal government program operates with federal dollars.12

The reason that so many states have only recently begun to waive their immunity, and some still exercise significant portions of their immunity against torts, is that governments amend their immunity doctrine only after achieving sufficient economic strength to withstand the legal and financial liability that accompanies a waiver. Without this ability to correlate the scope of exposure with the capacity to pay, state governments would face the risk of those who would raid the public fisc through litigation and threaten the existence of political and civic institutions. This rationale holds even greater relevance for tribal governments because they are just beginning to emerge as economically viable institutions. Because most tribes have limited resources, little ability to raise tax revenues, and still depend heavily on the federal government for much of their revenue, immunity from damage suits is tremendously important to their continued stability and development.

In considering Title II of S. 2097, NCAI would like to clearly note that each state government has had the freedom to waive its tort immunity in its own way and in its own time. Tribes should be allowed this same freedom to decide when a waiver of immunity is feasible, and when such a waiver could cripple a developing government. In our review of the record from the tribal immunity hearings, we could find little evidence of unbridled reliance on tribal tort immunity. In fact, there was a great deal more evidence of questionable state government use of the doctrine. Nevertheless, NCAI fully understands and recognizes the challenges that the Committee has faced in fending off the extreme attacks on tribal immunity embodied in S. 1691, and the desire to create legislation that will assure Congress that, where appropriate, parties who are harmed by tribal government activities do have an opportunity to be compensated.

NCAI would like to bring to the forefront tribal governments' concerns with correlating the scope of liability exposure with the capacity to pay. Section 201 of the bill is somewhat unclear in delineating who will pay for the insurance, but it appears that the bill intends to use existing federal funding for tribes from the BIA budget. For most tribes the existing federal funding is overwhelmingly inadequate, and adding the burden of insurance premiums of some unknown amount would simply exacerbate a situation of chronic under funding of tribal operations.

However, Section 202 of the bill contains provisions for what could be a very useful study of risk and coverage of tort claims against tribal governments. The study is not due to be completed for three years, while the insurance requirements take effect after only two years. NCAI would like to put the horse back before the cart and ask the

12 Indian Self-Determination and Education Assistance Act and related acts. Pub. L. No. 101 -1 52, Title III, 104 Stat. 1959 (codified at 25 U.S.C. § 450).

Committee to gather further information on the expense of coverage and its impact on federal funding before proceeding with a program of mandatory insurance. As noted above, most tribal governments already purchase insurance to cover a great deal of their activities and filling the gaps in coverage may be a very affordable prospect. A study that would identify those gaps and estimate the cost could provide the assurance to Congress and to tribal governments that Title II is within the means of existing tribal revenues.

NCAI is especially concerned with the impact on the many tribal governments with fewer

resources, and requests that these concerns be studied in detail. If Section 201 does create a significant burden, there is a clear responsibility of the federal government to provide the necessary funding to alleviate this burden. Tribal governments have already had some experiences with skyrocketing medical malpractice insurance under Self-Determination Act contracting. An appropriate solution in that instance was to provide coverage for tribes under the FTCA, and this solution may also be appropriate in some instances under the scheme envisioned in S. 2097.

Conclusion

NCAI would like to extend its sincere thanks to the Chairman and Vice-Chairman and the many other members of the Committee for this hearing on matters that are so critical to tribal self-governance and the cultures and futures of Indian people. As the work continues for solutions to the issues that have been raised today, NCAI would encourage the Committee to bear three points in mind.

First, one-size-fits-all solutions have proven to have disastrous effects when applied among the diversity of Indian Nations in this country. NCAI is particularly concerned about the impact of an insurance requirement on tribal governments with fewer resources. A comprehensive review of the variety of circumstances and specific issues is far more likely to lead to workable solutions.

Second, many of the issues that have been raised regarding state taxation on tribal lands involve matters of purely local concern that can be resolved on the local level among the tribes and states. The role of the federal government in these instances should be to encourage local negotiation and cooperation.

Third, and finally, any solutions should be guided by the principle that it is the federal government's role to protect tribal self-government. NCAI is looking forward to working on these challenges with the Committee.

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